

IN SENATE OF THE UNITED STATES.

JANUARY 5, 1848.

Submitted, and ordered to be printed.

Mr. BRADBURY made the following

REPORT :

The Committee of Claims, to whom were referred the memorials of George Hervey, agent for the owners and consignees of the English ship James Mitchell, praying for the payment of a balance of \$1,350 55, due on an appropriation made by Congress, have had the same under consideration, and report:

That by the act of Congress of May 28th, 1830, for the relief of said Claxton, it was made the duty of the Secretary of the Navy, "to pay to the person or persons who may be legally entitled to receive the same, or who may have legally paid the same, the *taxable costs* decreed to be paid by Alexander Claxton, a master commandant in the navy of the United States, in the suit prosecuted by him against the English merchant ship James Mitchell, in the superior court of the district of East Florida," and a sum not exceeding \$5,264 98 was appropriated for said purpose.

That the Secretary of the Navy, upon the presentation of the bill of costs to him for payment, under said act, referred the same to the Fourth Auditor of the Treasury, to examine and report what amount of costs came within the act to which the case refers; that the auditor, after an examination of the records of the case in the court, and of the facts out of which the claim originated, made an elaborate report to the Secretary of the Navy, and that the Acting Secretary, after "a careful examination" of the subject, declared by him to have been bestowed upon it, decided to allow items amounting in the aggregate to \$3,914 43, and to reject sundry other items, the payment of which is sought in the present memorials. This decision was made in June, 1833; and the amount allowed by the Secretary was received by the memorialist in July of that year; and he sets forth in his memorial, that "for reasons which it may not now be pertinent to allude to," he has not presented his case to Congress, until by his memorial of December 5th, 1846, more than thirteen years after the decision of the Navy Department was promulgated, and against which, during all that period, he made no

appeal to Congress for redress, nor representation thereto, that he supposed any injustice had been done to him.

The ground upon which the opinion of the Acting Secretary of the Navy was based, was, that the bill of costs presented for payment embraced several items, amounting in the aggregate, at least, to the sum rejected, which could not appropriately be taxed as costs against Captain Claxton.

It appears from the statement of facts, contained in one of the papers laid before the committee with the memorial, that the James Mitchell run aground, on the coast of Cuba, on the night of June 4th, 1827; that she was, after very considerable exertions, relieved and got afloat by the officers and men from the United States ships John Adams and Hornet, her crew having mutinied while she was aground, and her commander having given up the command of her to an officer of the Adams, who arrested and secured the mutinous portion of the crew. On the 8th, the portion of the cargo which had been taken out having been replaced, the John Adams, Captain Wilkinson, and Hornet, Captain Claxton, sailed with her, although in a leaky condition; to Havana, where she was bound, and there, laying off and on, without entering, claimed of the consignees \$35,000 salvage as the condition of delivering the vessel and cargo into their hands. Upon their refusal to make any compromise, or to pay any sum, excepting such amount of salvage as might be decreed by the appropriate court in Havana, she was taken, by those having charge of her, to Key West, and there run aground in consequence of the increase of her leak, and her dry goods were taken out and put in store.

Captain Claxton then filed a libel of the vessel and cargo in the admiralty court of Florida, claiming salvage; to which libel the British consul for Florida, and the master of the James Mitchell, both answered, each claiming the right to defend. A sharp contest arose between the consul and the master upon this question, which is thus characterized by the court: "The question then at the bar, which has excited so much heat, and produced such extensive research, is a question altogether as to consul fees, and who shall have the prosecution of this claim, that his counsel may be paid."

This question occupied the court from the 23d to the 30th of July, when the decision was rendered in favor of the consul. The suit then progressed between Captain Claxton and the consul, until the 15th of August, when the court delivered the opinion, that if the sailors had taken the James Mitchell into Havana, where she was bound, and where the consignees and agents of the insurers resided, they would have been entitled to \$12,000 salvage; but by taking her to Key West, they had done as much harm to the property as they had before rendered service, and had forfeited their right to salvage altogether; the decree of the court was, that the libel be dismissed with costs against the libellant. Three days after this decree, the British consul petitioned the court to order the immediate sale of the vessel and cargo, and the decree was passed for their sale in twenty-five days, unless the parties interested should pay to the marshal the costs and charges that should

be taxed by the court against the ship and cargo, in which event, they were ordered to be delivered into their possession.

On the 21st of August, another order was passed providing that upon the payment of \$4,000 to the marshal, to be by him deposited in the registry of the court, the persons interested (the consignees and agents for the insurers) should be entitled to receive the ship and cargo; said sum to be held liable for the costs and charges which may be ascertained and taxed; or, if the parties preferred it, enough of the vessel and cargo might be sold to make up \$4,000, and the rest restored.

The consignees then offered to pay the marshal the \$4,000, and receive the cargo without the vessel, but he refused to receive it, upon the allegation that he had no authority to separate the vessel and cargo; and a person then appeared, claiming to represent the Lloyds, of London, and united with the consignees, who again offered to pay the \$4,000, and receive both vessel and cargo, but the marshal refused to receive the money and deliver them up; and they then protested against the proceedings of the court and sale of the property, as well as against the original act of Captain Claxton, in bringing them from Havana to Key West.

The ship and cargo were sold, and some \$30,000 paid over to the owners by virtue of an order issued on the 14th of September. The case, however, appears to have been still kept on the docket, and as late as December 30th, 1829, on motion of the attorney for the British consul, his name was struck from the docket, and that of the memorialist substituted.

The bill of cost presented embraced the cost and expense arising in these various proceedings from the issue of the original motion to the paying over the proceeds of the sale of the vessel, and very possibly subsequently to that time, without giving, in many instances, the particular services for which the items are taxed, or the dates when they were rendered.

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|---|----------|
| The clerk's bill is put down in one item at..... | \$288 22 |
| The counsel fees, at the moderate sum of..... | 2,500 00 |
| And the marshal's commission on the sale, at..... | 726 34 |

It will be recollected that the libel filed by Captain Claxton was dismissed on the 15th of August; and that, by order of the court, the vessel and cargo were to be delivered up by the marshal to the parties interested upon the payment of \$4,000 to the marshal to meet the costs, which sum was offered to him and he twice refused to receive it. By no fair construction of law can Captain Claxton be held responsible for the marshal's refusal to comply with the order of the court, nor for the cost and expenses that were the consequences of such refusal.

The marshal's commissions on the sale of the property come within this principle, together with several other items to which we have not particularly referred; and a part of the clerk's bill may be for commissions on the proceeds of the sale deposited with him; and no inconsiderable portion of the counsel fees may have arisen in the controversy between the British consul and the cap-

tain of the James Mitchell, in relation to the right to defend, which produced, in the language of the court, "such extensive research," and upon the petition for the sale of the property, and in the course of the proceedings that were had after Captain Claxton's libel had been dismissed.

The controversy between the consul and the captain of the James Mitchell occupied the court from the 23d to the 30th of July, and that between the consul and Captain Claxton, on the libel, was brought to a decision on the 15th of August. The entire bill for witness fees is only \$51 25. The court delivered its opinion, dismissing the libel, in about two weeks after the question could have come up for a hearing, and \$3,914 43 have already been allowed and paid to the memorialist, as taxable cost claimed by him against Captain Claxton in that controversy.

It is believed by the committee that the allowance made by the Acting Secretary of the Navy was liberal; that it awarded to him all that Captain Claxton ought, in justice, to be held to pay; and that there is no good reason for overruling his decision.

Indeed, if the question were an open one, and the money received by the memorialist were now in the treasury, it is very possible that the bill of costs presented in this case might be subjected to a larger and more equitable deduction than that which has been made.

It will be recollected that the court place their decision against Captain Claxton upon the ground that, after he had rescued the James Mitchell from peril or destruction, he forfeited all right to salvage by the subsequent proceedings in claiming excessive salvage, and taking the ship from the harbor of Havana, where she was bound, in a leaky condition, and bringing her to Key West, thereby doing as much harm to the property as he had rendered service.

The United States have paid nearly four thousand dollars for costs growing out of this transaction; and it is believed by your committee that they ought not to pay more. They therefore unanimously recommend the adoption of the accompanying resolution:

Resolved, That the prayer of George Hervey, agent for the owners and consignees of the English ship James Mitchell, ought not to be granted.